

U.S. Supreme Court Rules on Travel Ban

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Today the U.S. Supreme Court (SCOTUS) issued a mixed decision in the “Travel Ban” litigation, relating to Presidential Executive Order 13780 (“EO”). As explained in more detail below, the SCOTUS decision gave a partial victory to the respondents who had challenged the EO while at the same time upholding the travel ban and related provisions for certain foreign nationals who cannot demonstrate a sufficient nexus to a family member, employer, educational institution or other entity in the U.S.

The Supreme Court granted certiorari and consolidated the two federal court cases from the 9th Circuit Court of Appeals and the 4th Circuit Court of Appeals. It will hear arguments in the consolidated case in the Court’s October, 2017 term.

There are three sections of the EO that were in issue before the Supreme Court: (1) the section of the EO that sought to stay for 90 days the entry into the U.S. of nationals of Iran, Libya, Somalia, Sudan Syria and Yemen; (2) the section of the EO that sought to suspend for 120 days decisions on applications for refugee status and travel of refugees into the U.S.; and (3) the section of the EO that sought to limit fiscal year 2017 refugee admissions to no more than 50,000.

How the Supreme Court ruled: SCOTUS granted a partial stay of the Circuit Court preliminary injunctions that had been issued against the above-referenced sections of the EO. The Supreme Court based its decision on a distinction between those foreign nationals seeking entry who have credible claims of a bona fide relationship with a person or entity in the United States, and those foreign nationals who are not able to establish that they have such relationships. For those individuals who can demonstrate the required relationship, it left the injunctions intact and neither the 90-day travel ban, nor the above-referenced refugee-related provisions will take effect. For those who are not able to prove the required relationship, the 90-day travel ban and the refugee-related provisions will remain in effect.

Timing of the Implementation of the Travel Ban as to Those Who Cannot Demonstrate Sufficient Ties to the U.S.: Pursuant to a Memorandum issued by the White House on June 14th, the travel ban would take effect 72 hours after SCOTUS stayed the Circuit Courts’ injunctions. In light of today’s SCOTUS decision, based on the above-referenced memorandum, the revived travel ban and refugee ban will likely take effect on Thursday, June 29, 2017. If the ban becomes effective on June 29, 2017, then it would end 90 days later, on Wednesday, September 27, 2017.

Practical Impact of SCOTUS Ruling: The result of today's decision is that for the duration of the forthcoming 90-day travel ban, it will be up to each impacted foreign national seeking (a) a visa to the U.S. and (b) admission into the U.S. at an international airport or U.S. border to prove that s/he has a credible claim of a pre-existing bona fide relationship to a family member or entity (such as an employer, educational institution, business association, hospital, etc.) in the U.S.

Unanswered Questions: Today's Supreme Court decision leaves many questions unanswered. It is not yet clear how much proof and documentation will be required to prove the required relationship and it is not yet clear how much authority the U.S. government will cede to the airlines in evaluating whether the relationships are sufficient. Similarly, it is not yet clear what guidance the Administration will provide to U.S. Customs and Border Protection (CBP) officers about their role in determining whether the required relationship has been sufficiently proved. For example, will the Administration instruct CBP that it should accept the issuance of a visa to an affected foreign national as sufficient proof of the required relationship or will the Administration instruct CBP to re-adjudicate this issue when the applicant for admission is seeking entry into the U.S.?

Because Consular Officers will need to make judgments about impacted foreign nationals' relationships to parties in the United States, it seems likely that visa applications by impacted foreign nationals could be delayed, which could in turn delay other visa applications by non-impacted visa applicants. It is also possible that some impacted applicants for admission may be detained for additional questioning by CBP upon arrival in the U.S.

Due to the unusual nature of the Supreme Court's mixed decision, all eyes will be on the statements that will be made by the Department of Homeland Security, Department of Justice, and Department of State, about the forthcoming implementation of today's decision.

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National Law Review, Volume VII, Number 178

Source URL: <https://natlawreview.com/article/us-supreme-court-rules-travel-ban>